Department of Justice Canada

Ministère de la Justice Canada

An opinion on reform changes with respect to the principles and purposes of sentencing

Leslie Dunning

Research and Statistics Division

Department of Justice Canada

October 2016

Canada

Information contained in this publication or product may be reproduced, in part or in whole, and by any means, for personal or public non-commercial purposes, without charge or further permission, unless otherwise specified.

You are asked to:

exercise due diligence in ensuring the accuracy of the materials reproduced;

indicate both the complete title of the materials reproduced, as well as the author organization; and

indicate that the reproduction is a copy of an official work that is published by the Government of Canada and that the reproduction has not been produced in affiliation with or with the endorsement of the Government of Canada.

Commercial reproduction and distribution is prohibited except with written permission from the Department of Justice Canada. For more information, please contact the Department of Justice Canada at: www.justice.gc.ca.

© Her Majesty the Queen in Right of Canada,
represented by the Minister of Justice and Attorney General of Canada, 2017

ISBN 978-0-660-08014-7
Cat. No. J22-30/2017E-PDF

Disclaimer: This paper represents my own thoughts and opinions and does not in any manner represent any opinions, policies, or views of the Ministry of Justice of Saskatchewan.

Introduction

I have been asked to provide an opinion on reform changes with respect to the principles and purposes of sentencing. I am a status Indian and am a member of the Yellow Quill First Nation in the Province of Saskatchewan. I have been a lawyer for 8+ years and practice in the capacity as a Senior Crown Prosecutor for the Province of Saskatchewan. For the past three years, I have taught *Sentencing in the Criminal Justice System* as a Sessional Lecturer at the College of Law, University of Saskatchewan and currently in my last year of completing an LL.M. The material in this paper is gathered from my own experience as an Aboriginal lawyer and academic reflecting only what I know from practicing, studying and teaching in the Province of Saskatchewan.

The opinion paper provides some recommended changes. Principles of denunciation and deterrence are important within sentencing; however, I have outlined some of the challenges and have questioned whether these two principles fulfill the goal they are meant to achieve. Overall, I concluded they should remain as is. Next I reviewed the principle of rehabilitation. I suggested broadening the scope of the sentencing principles to include reform changes in the *Criminal Code* with respect to people with mental disabilities and cognitive impairments. Lastly, rehabilitation and proportionality were discussed with the several listed challenges to mandatory minimum sentences I have questioned the effectiveness of mandatory minimums and suggests they are far too restrictive, detrimental and have limited the discretion of judges and lawyers.

Purpose of Sentencing

Section 718 of the *Criminal Code*[1] provides the purposes of sentencing. The section states the following:

> s. 718. The fundamental purpose of sentencing is to protect society and contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> (b) to deter the offender and other persons from committing offences;
> (c) to separate offenders from society, where necessary;
> (d) to assist in rehabilitating offenders;
> (e) to provide reparations for harm done to victims or to the community; and
> (f) to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims or to the community.

The first change I would suggest would be right in the beginning of the purpose statement. The purpose of sentencing is very clear in the first part of the clause. The part that confuses me and grammatically seems awkward is the following: "to respect *for the law* and the maintenance of a just…" The wording does not make sense. I would suggest it be changed to: "to respect the law and the maintenance of a just…"

Denunciation and Deterrence Principles

Denunciation and deterrence principles should remain within the scheme of the sentencing process. There are however, some criticisms worth discussing. Crimes against children under s. 718.01, crimes

[1] *Criminal Code*, R.S.C. 1985, c.C-46 [Criminal Code].

against peace officers under s. 718.02 and “other additional factors” under s. 718.21 should remain the same. Section 718.2(a) sets out guidelines within the *Code* which also set out effective principles deeming certain factors as aggravating, and should also remain within the section but there could be some modifications as I will discuss throughout the paper. The criteria listed in sections 718.2(a)(i)-(v) are effective guidelines for judges when sentencing offenders, and should be left unchanged.

One of the questions that should always be at the heart of the principles of sentencing, is whether denunciation and deterrence actually work for both an offender and satisfy public concerns about crime. Examining statistics in Saskatchewan (and nationally[2]) with the types of crimes committed essentially challenges whether general or specific deterrence is effective.[3] Many of the crimes that were reported, that resulted in Saskatchewan’s increase are of a violent nature including homicide, robbery, firearm offences and sexual assaults. Crimes of this nature often attract jail sentences. Looking nationally, the CSI index reported that there are increases in fraud, break and entering, robbery and homicide. [4] This would suggest where violent crimes are committed, principles of denunciation and deterrence are not very effective. The question then becomes whether denunciation and deterrence have much of an effect on offenders for crimes where these two principles are primary considerations. Furthermore, what is the reaction from the public about how deterrence and denunciation are applied?

Crimes such as child pornography or sex offences against children are an easy example of how deterrence and denunciation are ineffective. Police in general have placed a lot of resources into investigating these types of crimes and once the offender is caught and sentenced it appears as though the deterrence factor means nothing to other offenders who are still committing similar crimes.[5]

RCMP have reported the following:

> “Canadian children and youth are over-represented among the category of victims of sexual abuse. Research by Brzozowski (2004)[6] suggests that children under the age of 18 accounted for 23% of the Canadian population yet they represented 61% of sexual assault victims.”[7]

In some cases, offenders automatically receive mandatory minimums for various types of crimes against children. In many child pornography cases judges will discuss the procedure of how police “caught” the offender. The case information is often broadcast on the news and yet offenders still commit crimes of

---

[2] Statistics Canada, “Police-reported Crime Statistics in Canada 2015,” online: < http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14642-eng.htm>. The statistics indicate a 3% rise in crime nationally.
[3] Brian Rogers, “Saskatoon, Regina has the highest crime rates in Canada in 2015” CBC news online : <http://www.cbc.ca/news/canada/saskatchewan/crime-rises-in-saskatchewan-2015-1.3687458>. CBS reports a 10% rise in crime from 2014, again see Statistics Canada, “Police-reported Crime Statistics in Canada 2015,” online: <http://www.statcan.gc.ca/pub/85-002-x/2016001/article/14642-eng.htm>.
[4] *Ibid*.
[5] This is not to say that deterrence and denunciation never work. There are examples from my experience where I have observed people come to court very ashamed for the crime committed (i.e. Impaired driving simpliciter) where offenders were noticeably embarrassed and felt very ashamed for their actions. It is surprising to note however, how many people are not impacted at all by these two principles. Perhaps that goes more towards human behavior and deviance, which would require a different opinion and level of expertise.
[6] Brzozowski, Jodi-Anne, (2004). Family Violence in Canada: A Statistical Profile.
[7] RCMP, “Internet Based Sexual Exploitation of Children and Youth Environmental Scan; Executive Summary,” (January 2005) online: <http://www.rcmp-grc.gc.ca/ncecc-cncee/factsheets-fichesdocu/enviroscan-analyseenviro-eng.htm>.

this nature, again challenging whether the deterrence or denunciation goal has any effect on an offender and the public who are hearing about the cases.

One prime example is the case of *R v Pattison*.[8] Pattison was one of the most aggravating cases the Saskatchewan courts had before them, whereby Mr. Pattison was sentenced to 5 years for possessing over 4500 images and videos of very young children including infants.[9] It was described by Madam Justice Douvall as:

> ... [the images and videos] are vile in nature to the point of being "life changing" in their effect upon one's psyche. At points when being shown these images, the Court was numbed by their depravity.[10]

Mr. Pattison was just recently charged again for offences while he was out on statutory release. The charges were from January 25 - March 22, 2016 for possessing child pornography and with sharing child pornography between January 25 and January 27, 2016.

In another case, *R v Gryba*,[11] Mr. Gryba was charged and sentenced for child pornography offences. During the search of the Gryba's home, as part of the investigation into the charges, a hard drive was found but encrypted. Police were unable to break the encryption at the time of him being sentenced, however at a later date, the police were able to obtain the contents of the material which included child pornography. The accused was then charged and sentenced again, even though these items resulted out of the first set of circumstances. Although Mr. Gryba was under no obligation to disclose what was on the disk, he chose to remain silent as it is his right.

Both cases of Pattison and Gryba are good examples of where denunciation and deterrence seemed to be of little effect to these particular offenders, and in fact, to any offenders who had been charged with offences after these cases were reported in the media. Pattison's case was more obvious that the deterring principle clearly had no effect on him as he began committing the same offences that he was initially sentenced for. Similarly, Gryba was clearly not deterred by not disclosing to police, even after being sentenced, that the encrypted files contained child pornography.

Crimes such as drinking and driving carry less of a penalty for first time offences yet the results from this crime can be devastating. Again, the purpose of sentencing within the mandatory minimum scheme is meant to denounce the unlawful conduct and to deter the offender by fines and prohibition, yet we continually see drinking and driving being one of the highest crimes committed across Canada.[12]

---

[8] *R v Pattison*, 2012 SKQB 330.

[9] *Ibid* at para 6.

[10] *Ibid* at para 76.

[11] See *R v Gryba*, 2016 SKQB 123.

[12] In Saskatchewan, if an individual is charged with impaired, over .08 or refusal to provide breath demand, Saskatchewan Government Insurance ("SGI") will suspend the driver's license until that person has been sentenced in a criminal court. Only then will the criminal code disqualification start to take effect. If the individual chooses to take the matter to trial, the administrative suspension will not be lifted unless the individual is found not guilty. If they are found guilty (no matter the length of time it took to the trial date), the disqualification becomes effective on the date of sentence. In May 2016, "SGI" reported in that month alone 351 charges related to impaired/.08/refusal offences. See online:

More recently, Saskatchewan has seen its own devastating cases where entire families have lost love ones. In *R v Peeteetuce*,[13] a sentence was delivered of 6 years global for 2 counts of criminal negligence causing death, criminal negligence causing bodily harm, flight from a police officer and impaired driving. Ms. Peeteetuce was intoxicated and fled from police in a stolen vehicle whereby she ran a stop sign and hit a car with three teenagers. Two died and one survived. Blaine Taypotat was sentenced to 9 ½ years for impaired driving causing death of a conservation officer on the same day Ms. Peeteetuce was sentenced.[14] More recently in *R v McKay*,[15] Ms. McKay was convicted of four counts of impaired driving causing death being three times over the legal limit. The victims were two parents and their two young children. McKay received a sentence of 10 years. Based on all these cases it calls into question whether denunciation and deterrence work because we continually see people drinking and driving.

Denunciation and deterrence are applied theoretically and practically by judges in sentences, however it does not seem that the public truly has an understanding of what this principle means. There seems to be some underlying perception in the public's mind that "the eye for an eye model" should be sought for certain crimes although the Supreme Court of Canada has made it very clear in *R v MCA*[16] that vengeance is not an acceptable approach. This concept has also been studied by academics Roberts, Crutcher and Verbrugge. Their study revealed that "the public tends to support a harm-based analysis of sentencing[17] in which the seriousness of the consequences far outweighs considerations of offender culpability"[18] using the example of drinking and driving causing death and drinking and driving *simpliciter*, where culpability is the exactly the same.[19]

I am not sure how this section can be reformed to instill in the public what these principle of denunciation and deterrence really represent. I am however, of the opinion that something needs to change to reflect the importance of these principles and to maintain confidence in the administration of justice, balanced with the protection of the public and public interest. I do not think the answer is through mandatory minimums as I will discuss below in the application of other principles and purposes.

Separation

Separating offenders from the community is sometimes necessary where the protection of the public is concerned, for example, in violent crimes or crimes against children. Based on my observations, the

---

< https://www.sgi.sk.ca/about/newsreleases/2016/mayspotlightresults.html>. Again, even with the additional penalty enforced by the province, we still see high rates of this crime occurring suggesting much of the public is not responding to the deterrence.

[13] *R v Peeteetuce*, 2015 SKQB 166.

[14] Wendy Wenieski, "Law Expert Weighs in on Peeteetuce and Taypotat Sentencing," Global News (June 17, 2015) online: <http://globalnews.ca/news/2058415/law-expert-weighs-in-on-peeteetuce-and-taypotat-sentences/>.

[15] Unreported decision before the Honourable Judge Barry Singer, July 27, 2016.

[16] *R v MCA*, [1996] SCJ No. 28, [1996] 1 SCR 5000.

[17] Social media has supported this notion of harm based analysis. Many news sites (CBC, Global News, Saskatoon Star Phoenix) post latest cases on their social media sites such as Facebook. Commentary after sentences are given by Judges, clearly show the public's support for harm based sentencing. You will often see comments such as "lock them up and throw away the key" or "bring back the death penalty."

[18] Referring back to the social media comments made by the public on the news sites, culpability seems to be recognized by some of the people who post comments whereas they do not seem to apply culpability to their point of view.

[19] Julian V Roberts, Nicole Crutcher and Paul Verbrugge, "Public Attitudes to Sentencing in Canada: Exploring Recent Findings," (2007) 49 Canadian J. Criminology & Crim. Just. 79 at 95.

issue arises in repeated non-violent crimes, for example, thefts. In cases where the parity principle is applied, the offender may be subject to a lengthy sentence based on the principle being applied or based on purpose of separation. Thefts in particular can be problematic as many cases coming through the court system are petty thefts whereby an offender is stealing for hunger or there may be some mental health issues. The person, with the repeated crime, may at some point start serving custodial sentences for the petty crime and each time that period of incarceration increases due to their record and the parity principle being applied. Too often many offenders are incarcerated for these types of crimes, or crimes of a non-violent nature. The term within the separation principle of "separating offenders from society, ***where necessary***" (with emphasis) seems to be overlooked. It may be more effective to change the term to "when necessary, separating offenders from society." A small change like this sends a strong message that judges need to consider whether incarceration is appropriate in the first instance then move to determine if the person should be separated based on the type of crime.

In my opinion, the restraint principle under s. 718.2(d) could be changed in the same manner as I have suggested with the purpose of separation. The restraint principle currently states:

> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.[20]

One of the goals in sentencing for judges is to balance and analyze the crime that was committed, the circumstances of the offence, and circumstances of the offender in order to determine the appropriate sentence. It is no surprise that Canadian jails are over populated and incarceration rates are high (especially amongst the Aboriginal population[21]). The exceptionally high incarceration rate has even been recognized through many cases and inquires.[22] Changing the wording in the restraint clause represents a strong intention from Parliament, that judges must look elsewhere besides jail and hopefully avoid the unnecessary use of over incarceration for various types of crimes (i.e. thefts, common assault, and mischief) that may not require jail. I would suggest the following change:

> "If less restrictive sanctions *are* appropriate in the circumstances, an offender should not be deprived of liberty."

The minor change offers judges to first consider whether there are less restrictive sanctions that are appropriate. If so, then an offender should not be deprived of liberty. It essentially changes the test in the section to offer liberty to the offender first, before incarceration.

<u>Rehabilitation</u>

Section 718.(d) and (e) are the rehabilitating purposes in the sentencing scheme. These particular sections are imperative within the principles of sentencing. As we already know conditional sentences were implemented by Parliament during the last major sentencing reform in 1994, recognizing that incarcerating offenders was not a means of rehabilitating them.[23] The primary goal for conditional sentences was to reduce the reliance upon incarceration by providing the courts with an alternative sentencing mechanism. Conditional sentences would still be able to maintain some type of denunciation

---

[20] *Supra n*ote 1.

[21] *R v Ipeelee*, 2012 SCC 13.

[22] *Ibid.* Also see *R v Gladue*, 1999 1 SCR 688; Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba* by Murray Sinclair & Alvin Hamilton (Winnipeg; Aboriginal Justice Inquiry, 1991).

[23] *R v Proulx*, 2000 SCC5, [2000] 1 SCR 61.

and deterrent effect.[24] The conditional sentence provides an opportunity to further incorporate restorative justice concepts into the sentencing process by encouraging those who have caused harm to acknowledge this fact and to make reparation.[25]

Many offences where conditional sentences are not available due to mandatory minimums or maximums sentences being changed within the Code, make the application of rehabilitation and reparation difficult to apply. It appears to me that in order to be able to fully and freely allow judges to apply discretion, this purpose of sentencing mandatory minimums need to be limited and reviewed. The mandatory sentences inevitably disallows any discretion the Judge has to attempt to assist the offender in goals of rehabilitation.

Megan Stephen interviewed several judges and assessed/explored their views on conditional sentences. She noted that most judges found "CSO's" "innovate[ive]" and described them as a "meaningful alternatives to incarceration." Other judges found there were practical concerns in terms of useful resources.[26] Although many judges noted that the sentencing reform in 1994, had significantly changed their way of sentencing, Stephens found that almost half the judges felt a "lack of political support for the restorative justice [in that] politicians do not want to be seen as being 'soft on crime.'"[27] With this valuable research it is important to maintain the restorative justice principles and that Parliament not allow the principle to be viewed as soft on crime but rather as a strategy for rehabilitation and crime prevention initiatives.

Restrictions on the application of restorative principles have increased over the past 4 years. Academic Jonathan Rudin argued that essentially due to mandatory minimums, Parliament has taken away judicial discretion and now that discretion has been left up to the Crown when determining whether to procced summarily or by indictment on certain crimes.[28] Rudin has also argued, and I would agree, that mandatory minimums have "severely constrained" the process to "implement *Gladue* and *Ipeelee* in a meaningful way."[29] In addition, mandatory minimum sentencing goals are fundamentally rooted in the principles of denunciation and deterrence.[30] This is contrary to any rehabilitation principles.

We see the purposes overlapping in section 718.2(e) which states that:

> "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to Aboriginal offenders."

This section recently changed with the implementation of the *Canadian Victim's Bill of Rights* (The "C*VBR*")[31] which I would argue adds a somewhat punitive aspect to the rehabilitation principle. What I view as the punitive aspect is the statement "…and consistent with the harm done to victims or to the

---

[24] See *R v Kutsukak,* (2006) 213 CCC (3d) 80 (Ont. C.A.); *R v Watkinson,* (2001) 153 CCC (3d) 561 (Alta. C.A.).
[25] *Supra* note 24 at 98.
[26] Megan Stevens, "Lessons from the Front Liners in Canada's Restorative Justice Experiment; The Experience of Sentencing Judges," (2007) 33 Queen's L.J 19 at 45.
[27] *Ibid* at 51.
[28] Jonathan D. Rudin, "Looking Backward, Looking Forward: The Supreme Court of Canada's Decision in R. v. Ipeelee" (2012), 57 SCLR (2d) 375 at 381.
[29] *Ibid*.
[30] See *R v. Morrisey*, [2000] 2 SCR 90.
[31] *Canadian Victims Bill of Rights*, S.C. 2015 c. 15 s. 2.

community." This section is punitive in the sense that it requires judges to consider harm done to the victim or community. I do not think of the inclusion of the harm done is necessary within this section as Parliament has already implemented it in under s. 722 of the Code which mandatorily requires judges to consider any statement of a victim, if one is filed. Judges can also, under section 718.2(a)(iii.1) … [consider] "evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation." 718.2(a)(iii) certainly opens up the harm done to victims and could also include the community. Adding victim and community harm to the rehabilitation section seems onerous, excessive and displaced.

Courts have recognized the need to address the overrepresentation of Aboriginal people through rehabilitation. The Courts have already tried to reconcile the issues of the overrepresentation and impacts of colonization. The Honourable Mr. Justice Cory held the following:

> These findings cry out for a recognition of the magnitude and gravity of the problem and for the responses to alleviate it. The figures are stark and reflect what may fairly be termed a crisis in the Canadian criminal justice system. The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and criminal justice system reveals a sad and pressing social problem. It is reasonable to assume Parliament, in singling out aboriginal offenders for distinct treatment in s. 718.2(e), intended to attempt to redress the social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the cause of the problems and endeavor to remedy it, to the extent that a remedy is possible through the sentencing process.[32]

It is my belief that the Courts in Saskatchewan have been making some attempts to reconcile the application of Gladue principles when sentencing Aboriginal offenders. Section 718.2(e) should read: "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders." The statement "and consistent with the harm done to victims or the community should be considered for all offenders," should be struck.

Rehabilitation is not always an easy goal to achieve with the criminal justice system. One additional clause that should be considered in the rehabilitation section, relates to the presence of mental disorders and cognitive impairments. Although we see mental health being a problem for centuries it is a fairly new phenomenon in our court system, especially when it comes to sentencing. Mental health and sentencing is a very complex issue. Saskatoon has quite recently (2014) started a mental health docket court and is still in the infancy stage of understanding what the outcome of the new the Mental Health Strategy data will represent.[33] Not everyone with a mental health diagnosis will end up in this court; criteria will depend on the willingness of the offender and the type of diagnosis.

Not all Canadian courts have this type of initiative and not everyone in "front line work" (Judges, Prosecutors and Defence Counsel) understand mental health. Drafting a clause including acknowledgement or an inquiry of mental health could assist many offenders in the rehabilitation process. The clause would at least require the judge to consider least restrictive and more rehabilitative principles when sentencing offenders with mental health issues. Again, this would be a strong message

---

[32] *R v Gladue*, 1999 1 SCR 688 at para 64.

[33] See Saskatoon Mental Health Strategy, online: < http://www.sasklawcourts.ca/index.php/home/provincial-court/adult-criminal-court/saskatoon-mental-health-strategy>.

from Parliament that mental health and cognitive impairment is a serious issue and requires serious thought before determining appropriate sentences for offenders.

In the case of *R v Machiskinic*,[34] Trevor Machiskinic was charged with aggravated assault. Mr. Machiskinic was an Aboriginal male who suffered from mental health problems, in particular it was suggested that he had Fetal Alcohol Spectrum Disorder. Mr. Machiskinic was bullied and teased about his sexuality over a long period of time by his cousin resulting in him beating his cousin with a baseball bat. Mr. Machiskinic had no prior criminal record and despite that and his cognitive impairment, he was sentenced to one year in jail with 12 months of probation to follow. There were two issues with this case that created much criticism. First, it was contended by his lawyer that Gladue was misapplied. Secondly, the fact that Mr, Machiskinic had a cognitive impairment was not taken into account during sentencing. The lawyer for Mr. Machiskinic attempted to appeal the decision, however leave to appeal was denied. Machiskinic's case is a sad and disturbing example of how courts lack understanding with mental health issues. Unless Parliament implements change by addressing the impact of mental health and cognitive impairment, courts may not always take these factors into consideration when sentencing offenders. [35] Therefore, it would be helpful if there was a clause to address offenders with mental health or cognitive impairment and that the clause may consider all alternatives to incarceration. Many of the offenders with cognitive impairments require a different type of specialized care, not jail.

One last point on s. 718.2(e) is that it only focuses on Aboriginal offenders. When the last reforms were made, it was specifically targeted to the over-incarceration of Aboriginal offenders. While I do not have specific data of the overall minority groups incarcerated, I think this is something that Parliament may want to turn their mind to. In fact Julian Roberts and Andrew von Hirsh looked at this same issue shortly after the last reform in 1996 noting the following:

> "Aboriginal Canadians are not the only visible minority that is over-represented in the penal institutions. In fact, data from the province of Ontario show that racial disproportion of blacks in the province's jails is far greater than that associated with aboriginals…It seems clear that Black inmates in the Province of Ontario are subject to negative treatment that is not accorded other categories of inmates."[36]

Based on this commentary from nearly 10 years ago, I would think this is something that the racial distinction within the clause be amended in such way to keep the portion of the clause "with particular attention to the circumstances of aboriginal offenders" but to also make it inclusive to any over-represented ethnic group, as noted above.

<u>718.1 –Proportionality</u>

The Proportionality principle has been an effective principle in terms of allowing a judge to review that the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." In theory, this is an exceptional principle however, practically it does suffer challenges. One of the challenges was recognized in 1995 when Bill C-41 was in the process of being submitted.

---

[34] *R v Trevor Machiskinic*, unreported decision, Madam Justice Douvell, Queen's Bench Court of Saskatchewan, June 24, 2014.

[35] Also refer to the highly publicized Ashely Smith case where she was sentenced to jail for throwing crab apples and from there many institutional charges arose.

[36]Julian V. Roberts and Andrew von Hirsh, "Statutory Sentencing Reform: The Purpose and Principles of Sentencing" (1995) 37 Crim L.Q. 220 at 231.

Academics Julian Roberts and Andrew von Hirsch stated the following about the issue when proportionality was being drafted:

> The challenge to drafters of a statement of sentencing purpose and principle is to reconcile diverse and frequently conflicting sentencing aims. The task is not impossible, nor does it necessarily mean promoting a single sentencing purpose at the expense of all others.[37]

And although this statement is true, we would have to look back and ask judges directly of the difficulty they endure when trying to make this complicated theorized application when sentencing an offender.

One of the concerns Roberts and von Hirsh noted over twenty years ago, was that this principle would be "circumvented by the utilitarian objectives"[38] and suggested that to avoid this from happening, promoting any of the "10 objectives" of sentencing (although there are more now), could be applied within the proportionality principle. The concern was that proportionality would be outweighed by the utilitarian objectives.[39] So far we see many of the purposes already fall within the utilitarian theory such as incapacitation (separation), deterrence and denunciation. Restorative justice in some capacity could also fit in the utilitarian model (for example the use or purpose of the CSO). Overall, Roberts and von Hirsh do make a valid point in that the principle of proportionality was somewhat contradictory and convoluted when applied to the fundamental purpose under 718. Their suggested way of wording the proportionality clause was "the sanction must be proportionate in its severity to the seriousness of the offence and that offence serious is determined by the harmfulness of the conduct and the actor's degree of culpability." I agree, that this is a more descriptive way to word the section and perhaps of more assistance to judges in applying the principle than is presently worded.

One of the other major problems in the application of the principle of proportionality often arises when mandatory minimums are in effect. Crimes that carry mandatory minimums disallow judges to apply the principle of proportionality (and as outlined above some of the other principles and purposes of sentencing). For example, in a factual simple case where an individual is a single-mother who desperately needs money and offered to be a driver to individuals who happen to rob a store with an imitation firearm, would be potentially subjected to an automatic jail sentence. A conditional sentence order is not available to the single mother, considering she was at a very low end of moral culpability and had limited information about the crime itself. Even if she is sentenced as a party to the offence, she is still subject to a jail sentence as it is quite clear robbery offences with weapons carry mandatory minimums and would be subjected to jail.

Research from a study on public perceptions does suggest that there is "support for individualized sentencing within the mandatory minimum sentencing regimes."[40] As noted from the example above, mandatory minimums do have the potential to create injustices when trying to apply the gravity, degree and moral culpability when judges are forced into a mandatory sentence. In order to fully achieve and allow judges to apply proportionality, there should be some kind of judicial discretionary allowance within the sentencing process for judges to sentence below the mandatory minimums. As noted in the Roberts article, South Africa does allow for judicial discretion under "exceptional circumstances."[41]

---

[37] *Ibid* at 223.
[38] *Ibid* at 233.
[39] *Ibid* at 235.
[40] *Supra* note 20 at 99. [Roberts, Crutcher, Verbrugge].
[41] *Ibid* at 79.

Other wording that was suggested for this allowance was "…the court shall impose an appropriate custodial sentence for a term of X except where the court is of the opinion that there are particular circumstances which a) relate to any of the offences or to the offender; and b) would make it unjust to do so in all circumstances."[42] I would suggest that in order for the principle to be maintained effectively, some allowances must be made to give judges their discretion and to be able to apply the principle in a manner of fair justice considering all circumstances.

Well over 50+ offences now are subject to mandatory minimums. The problem with the mandatory minimums is that the principle of proportionality is only of limited application even for prosecutors and defence counsel. It takes away any opportunity to plea bargain. I recognize that it is not counsel's job to apply the principle like the judge, however when taking into consideration a plea proposal, proportionality allows prosecutors to look at all circumstances and level of responsibility of the offender to make a plea proposal. Mandatory minimums limit the ability of counsel to plea bargain which results in the court system being bogged down.

Mandatory minimums also call in question whether Parliament really trusts justice "front line workers." Maximum sentences listed in each offence clearly provide for judges, prosecutors and defence counsel what Parliament has intended or deemed as an appropriate sentence for offences that are of a serious nature. The statutory scheme already provided guidelines as to what judges are to consider as aggravating or mitigating circumstances. In addition to that, courts have provided "ranges" on sentences even when the crimes are of a serious nature, effectively applying the principle of proportionality. For example, in Saskatchewan, "range cases" for home invasions are anywhere from 4-7 years depending on the circumstances.[43] In major sexual assaults, the starting range in Saskatchewan begins at 3 years and up.[44] Repeat drunk drivers with over four offences, the range starts from 18 months and up.[45]

<u>Conclusion and Recommendations</u>

I have provided several recommendations for change based on research, experience and case law. I have indicated that denunciation and deterrence principles should remain. I have provided some of the typical cases I see on a day-to-day basis, recognizing that some change needs to be made to maintain public confidence in the administration of justice. I have offered some language changes to the separation principle which mainly supports judges looking at alternative means to incarceration. Under the rehabilitation model, I have expressed my issues with the mandatory minimums and question how we achieve true rehabilitation if the options are becoming so limited. I have suggested that there be some changes made to some of the wording within s. 718.2 (e) excluding the victim portion of that clause and including a clause to represent minorities. Lastly, I discussed the proportionality principle and the challenges in applying the principle from two different perspectives. First I have challenged the mandatory minimums with the application of proportionality by replacing it with different wording to make it more concise and easier to apply. I have suggested that Parliament not place too many limitations on options for sentencing. I have provided examples throughout using the slow elimination of the conditional sentences. Lastly, I have suggested throughout that Parliament has taken away a lot of discretion from judges and lawyers and has limited our ability to do our jobs effectively. I have examples

[42] *Ibid*.
[43] See *R v Payne*, 2007 SKCA 28; *R v Campeau*, 2009 SKCA 3; *R v Pelly*,(2006), 210 C.C.C. (3d) 416.
[44] See *R v Bird* 2008 SKCA 65*; R v Dyck* 2014 SKCA 93.
[45] *R v Kakakaway*, 1998, CanLII 12376 (Sask.C.A.); *R v Mantee*, 2005 SKCA 147; *R v Bear*, 1994 CanLII 4609 (Sask. C.A.).

of cases where judges have, without mandatory minimums, been able to meet the principles of sentencing by providing effective law that we use on a regular basis in our practice.